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IN THE
Supreme Court of the United States.

LOUIS REINMAN AND LOUIS WOLFORT, PARTNERS DOING BUSINESS UNDER THE FIRM NAME OF REINMAN STABLES, REINMAN-WOLFORT AUTOMOBILE COMPANY, AND C. L. KRAFT COMPANY,

v. No. 153

THE CITY OF LITTLE ROCK, ET AL.

REPLY BRIEF.

MORRIS M. COHN,
For Plaintiffs in Error.

CENTRAL PRINTING CO., LITTLE ROCK

IN THE

Supreme Court of the United States.

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REPLY BRIEF.

The object of this reply brief is to call the attention of the court to the fact that the Supreme Court of Arkansas passed upon the case as if there was no other pleading than the bill of complaint, and held that to be insufficient. Therefore the argument for defendants in error can have no force, in which, on page 9 and succeeding pages of the brief of their counsel it is claimed that because an answer had been filed this ought also to be considered.

The record shows that in the Pulaski Chancery Court, from which an appeal was taken to the Supreme Court of Arkansas, a demurrer was sustained to the answer, and it was therefore held by that court to be

insufficient. (Printed record, 11-13.) Now the effect of the ruling of the State Supreme Court has been to deprive plaintiffs in error of the opportunity to try the issues set forth in their bill of complaint, if they be deemed sufficient in law to entitle them to a hearing. So far, as the case now stands in the record, the plaintiffs in error have had no opportunity to be heard on the allegations of their bill of complaint, if adequate to entitle them to a hearing thereon, because the Supreme Court of Arkansas has dismissed the complaint. The issues of constitutional law, under the Fourteenth Amendment to the Constitution of the United States, are thereby held to be without merit. And that leaves the issue which this court has to determine—whether the Supreme Court of Arkansas is right as to its ruling on the constitutional question.

The decision in the case of Thompson v. Jacoway, 97 Ark., 508, cited by opposing counsel (their brief, 9), has no application. That decision merely holds that if a plaintiff demurs to an answer, the demurrer may reach back to the complaint. It is true it is said that a defect in a complaint may be cured or aided by the answer, but that obviously means that if the defendant demurs to a complaint simultaneously with the filing of his answer, the answer may be read by the plaintiff in aid of his complaint, if defective, as a means of defeating the demurrer to the complaint. But that is not sought to be done here.

The record discloses that a demurrer had been filed to the bill of complaint in the trial court, on behalf of defendants, and that this was overruled. The Supreme Court in effect sustained this demurrer, and dismissed the bill. Therefore the answer counts for nothing in determining whether the bill of complaint contains sufficient to entitle plaintiffs in error to a hearing. We are not invoking the allegations of the answer in support of the allegations of our complaint, to cure any defects therein. We are standing solely upon the allegations of this bill of complaint, claiming that it is sufficient. If any one is entitled to invoke the doctrine of Thompson v. Jacoway, *Supra,* we are, not defendants in error.

We deem it unnecessary to add anything to what we said in our former brief, in reply to the brief of opposing counsel, on other points. It is sufficient to say, we submit, that they are entirely reconcilable with the contention we are making in this case.

Respectfully,

MORRIS M. COHN,

For Plaintiffs in Error.

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IN THE

SUPREME COURT OF THE UNITED STATES

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ABSTRACT, BRIEF AND ARGUMENT FOR DEFENDANTS IN ERROR.

J. Merrick Moore,

J. W. & J. W. House, Jr.,

Attorneys for Defendants in Error.

DEMOCRAT PRINT. & LITHO. CO., LITTLE ROCK

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LIST OF CASES

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ABSTRACT, BRIEF AND ARGUMENT FOR DEFENDANTS IN ERROR.

ABSTRACT.

In addition to the abstract which appears in the brief of plaintiffs in error, we wish to add the answer of the defendants in error, which the printed report shows was filed in the Pulaski Chancery Court. It is as follows:

> "On this day comes the defendants, and in answer to the compalint herein, state:
>
> They deny that plaintiffs carefully and properly conduct their business in accordance with the rules and regulations of the Board of Health of the State of Arkansas; they deny that for a number of years

last past said livery business has been conducted at said point without complaint as to sanitary conditions or in the manner in which the same was kept.

Defendants deny that said livery and sales stable business of said plaintiffs is not within the principal business or shopping district in the city of Little Rock, and they deny that there is very little business transacted in this vicinity; but they state that said livery and sales business of said plaintiffs is conducted in the heart of the business district of the city of Little Rock.

Defendants deny that plaintiffs have entered into leases for the grounds and improvements thereon, and deny that they have constructed a brick building facing on Louisiana street at a great cost to themselves; they deny that the building can not be used for other purposes, and deny that plaintiffs have made other large expenditures for improvements, and deny that they have entered into obligations covering large sums to promote their business, and deny that they will suffer any loss if compelled to abandon said site and cease to do business there and deny that there is no other available site in said city where said business can be profitably carried on.

Defendants deny that the city has encouraged for many years last past the establishment of said livery business at said locality and vicinity, as set out in the complaint, and deny that plaintiffs relied on such encouragement and made expenditures on said buildings; they deny that plaintiffs have exercised proper care in preventing any improper deposits or smells to occur in connection with their business, and deny that they use the most improved methods for cleanliness as such methods have become known. Defendants state that plaintiffs were never given any permit to build or conduct a stable at the present location by the city council.

Defendants deny that the city council of the city of Little Rock has the power or inclination to intimi-

date and discourage persons from continuing the livery business in said city, and deny that the ordinance in question was procured to be passed by the Gus Blass Dry Goods Company, The M. M. Cohn Company, Wolf Dry Goods Company, and the Little Rock Trust Company, with others interested in the purchase of the property from plaintiffs; they deny that the passage of said ordinance was in furtherance of the efforts of the above-mentioned parties to obtain the property of plaintiffs without due process of law, or without the right of eminent domain.

Defendants deny that the buildings of plaintiffs, on account of their construction, are unsuited to other business; deny that if plaintiffs are prohibited from carrying on the livery stable business in said buildings that said property will be taken from them without proper compensation or without their day in court; defendants deny that the method of fining provided is an effort to do indirectly under the guise of the police power what the city has not the right to do directly, and denies that said ordinance was aimed at plaintiffs directly, and denies that said ordinance is discriminative and unreasonable, and not warranted by law.

Defendants deny that the effect of said ordinance renders the carrying on of plaintiff's business practically impossible; deny that said business, in drawing customers toward the locality where said business has heretofore been carried on, largely contributed and contributes now to the activity of said section as a business district, and creates custom for the business houses on Main street; deny that the enforcement of said ordinance would deprive the plaintiffs of their property and business without compensation and due process of law.

And for further answer, the defendants state: That the city council, in passing said ordinance, was actuated by the desire and obligation to protect citizens of Little Rock; that said ordinance was passed for the purpose of promoting the health and prosperity of the citizens and to increase the value of the

property in said district; that it was established with the utmost good faith and with the belief that said livery stables in said district were conducive to sickness and inconvenient and ill health of the citizens and damaging to the property in that vicinity.

Defendants state that said district composes the greatest shopping districts in the entire State of Arkansas; that it contains the largest and best hotels in the State, and the district encompasses the most valuable real estate in the entire State; that said stable business is conducted in a careless manner, and that it is nothing unusual in connection with said sale stables to have from fifty to one hundred head of horses and mules driven through the principal streets to said stables; that there is always an offensive odor coming from said stables to the great detriment of the tenants in the property adjoining and to the shoppers who go within this district and hotel guests; that said stables being in such densely populated part of the city produces disease, making that section extremely unwholesome and unhealthy; that said stables retard the growth and prosperity of this district and depreciates the value of the adjoining property by at least 20 or 25 per cent, and prevents improvements from being made thereon on account of the stables conducted in said district.

Defendants further state that the conducting of livery stables within the prescribed district is inconvenient, dangerous, offensive and unhealthy to the inhabitants of said district, and to the shoppers thereof and to the community at large, for the reason above stated, and because the livery stables afford the most favorable condition for the breeding of flies and other obnoxious insects which spread disease and contagion; that the conducting of said livery stables in said district is dangerous to the morals, health and safety of the inhabitants for the reason above mentioned; that the fire risk is greatly increased in said district by said livery stables because of the large amount of inflammable material that neces-

sarily accumulates, and which is necessary for carrying on said livery stables.

Wherefore, defendants having fully answered, pray that said complaint be dismissed, and for all other and proper relief that they may be entitled to." (Printed record, 8, 9, 10.)

To this answer a demurrer was filed, which was sustained, and is as follows:

"Come the plaintiffs and except to the sufficiency of and demur to the answer herein and for cause, state:

That the answer is insufficient in law to raise an issue of fact for this court on the justification of authority assumed by defendant, the city of Little Rock, to pass, and the defendants to enforce the ordinance complained of in plaintiffs' complaint.

That said answer does not show authority to pass or enforce such an ordinance by defendants, or either of them.

That said answer renders no issue which this court will hear in response to plaintiffs' complaint.

That said answer does not state facts sufficient to constitute a defense to plaintiffs' complaint." (Printed Record, 11.)

BRIEF.

I.

This case should not be considered on the complaint alone, but it should be considered on the complaint, the answer and the demurrer, as it was considered by the Supreme Court of the State of Arkansas.

Thompson v. Jacoway, 97 Ark. 508.

II.

The allegations of fraud in the complaint, on the part of the city council in passing this ordinance, is not to be considered by this court: First, because the answer denied this allegation and the demurrer to the answer admitted this allegation in the answer; second, the decision in this case by the Supreme Court of the State of Arkansas shows that in the State of Arkansas the question of fraud, with reference to ordinances of the city council, is not a question that can be inquired into, and this decision shows on its face that that is a rule of law in this State and the Supreme Court of the State having passed on that question, it is not open to this court to review.

Slaughter House Cases, 16 Wallace 36.

Crowley v. Christensen, 137 U. S. 86.

Fischer v. St. Louis, 194 U. S. 361.

III.

The ordinance in question is purely a regulation and not a prohibition.

St. Louis v. Russell, 22 S. W. 470.

Russell v. Beattie, 16 Mo. App. 137.

Ex parte Lacey, 49 Am. St. R. 93.

Barbier v. Connolly, 113 U. S. 27.

Slaughter House Cases, 16 Wallace 36.

Soon Hing v. Crowley, 113 U. S. 703.

Mugler v. Kansas, 123 U. S. 623.

Beer v. Mass., 97 U. S. 32.

Lawton v. Steele, 152 U. S. 133.

Gundling v. Chicago, 177 U. S. 183.

Fischer v. St. Louis, 194 U. S. 361.

C. B. & Q. Ry. v. Ill. Drainage Co., 200 U. S. 561, and the cases therein cited.

IV.

The fact that the livery stable is not a nuisance *per se*, does not prevent a regulation on the part of the city council. This ordinance was intended as a regulation, and not as a prohibition.

Canfield v. U. S., 167 U. S. 518.

Lawton v. Steele, 152 U. S. 136.

Barbier v. Connolly, 113 U. S. 27.

Kidd v. Pearson, 128 U. S. 1.

Fischer v. St. Louis, 194 U. S. 361.

Austin v. Tenn., 179 U. S. 343.

Powell v. Pa., 127 U. S. 678.

Murphy v. Cal., 225 U. S. 623.

V.

There can be no estoppel which would prevent the city from passing any ordinance for the protection of public health, morals and prosperity of the citizens.

Mugler v. Kansas, 123 U. S. pages 664-670.

ARGUMENT.

I.

Plaintiffs in error contend that the determination of the merits of this case should be on the complaint alone. We submit that this is not correct. It has not been the practice of this court to deal in technicalities, but it deals with a case upon its merits.

This case was submitted upon the complaint, the answer and the demurrer to the answer, and by the demurrer to the answer, plaintiffs in error admitted all the facts therein, and stood on the proposition that the city of Little Rock had no power to pass the ordinance in question. The effect of the demurrer to the answer has been settled in the State of Arkansas in the case of Thompson v. Jacoway, 97 Ark. 508, and at page 511, the following language is used:

> "It is urged by counsel for defendants that the complaint herein was defective as to the defendant Collier, and was itself subject to a demurrer; and that the demurrer filed to the answer related back to the complaint, and that the demurrer, being thus taken to the complaint, should have been sustained. It is claimed that in the complaint it was alleged that the mortgage upon which this suit is based provided that the property therein described should be sold and the proceeds thereof applied to the note sued on before defendant Collier should be required to pay any part thereof, and that it was not alleged in the complaint that this had been done. It is true that when a demurrer is filed to the answer its effect is to search all prior pleadings, and it operates, not only against the answer to which it is interposed, but it is also taken as a demurrer to the complaint upon

which the action is instituted; and if that pleading contains a fatal defect, it should be sustained as a demurrer to such complaint. Carlock v. Spencer, 7 Ark. 12; Wade v. Bridges, 24 Ark. 569; Yell v. Snow, 24 Ark. 555; Ward v. Terry, 30 Ark. 385; Bruce v. Benedict, 31 Ark. 305.

But a defect in the complaint may be aided and cured by an answer. If a complaint is defective because it does not make sufficient allegations, then it is aided by an answer which itself makes the allegations in which the complaint is deficient; and this cures the complaint. As is said in the case of C., O. & G. Ry. v. Doughty, 77 Ark. 1: 'A defect in pleading is aided if the adverse party plead over to or answer the defective pleading in such a manner that an omission or informality therein is expressly or impliedly supplied or rendered formal or intelligible.' Knight v. Sharp, 24 Ark. 602; Pindall v. Trevor, 30 Ark. 249; Davis v. Hare, 32 Ark. 386; Webb v. Davis, 37 Ark. 551; Ogden v. Ogden, 60 Ark. 70; Hess v. Adler, 67 Ark. 444."

This case shows that when the demurrer was filed the whole record was considered and judgment was rendered on the whole record, which was done in the case at bar. In the opinion of the Supreme Court of Arkansas in the case at bar appears the following: "The city council doubtless passed the ordinance to meet and remedy a condition actually existing." This tends to show that that court considered all the material allegations in the complaint as being denied and the denial admitted. The only question was whether or not the city council had the power to pass such an ordinance, and the Supreme Court of the State of Arkansas held that such an ordinance was not in violation of any State or Federal law, or of the Constitution, but was merely a police regulation, and was an effort upon the part of the city to regulate livery sta-

bles in the city of Little Rock, and that such a regulation was necessary for the comfort, health and prosperity of the State. This rule has been upheld by many decisions of this court and by the Supreme Court of Arkansas.

II.

Plaintiffs in error urge that this case should be reversed, because, taking the complaint alone, it shows that the ordinance was passed by fraud and corrupt influences. But, in this argument, learned counsel overlook the fact that the demurrer was filed to the answer, which denied this allegation made in the complaint, so that this question was not before the court.

Admitting, however, for the purpose of this argument, that the case should be considered on the complaint alone; then the decision of the Supreme Court of Arkansas was to the effect that there can be no going behind an ordinance of the city council on the question of fraud, and that the question is not one which can be inquired into. The opinion of the Supreme Court of Arkansas uses the following language:

> "The city council doubtless passed the ordinance to meet and remedy a condition actually existing." (Printed Record, 21.)

And, also, the following:

> "The ordinance in question does not attempt to prohibit the carrying on of the business, but only to restrict and limit it to a certain defined territory, or, rather, to prohibit the operation of it within the small prescribed area or district included in the ordinance. It does not amount to a prohibition of the business,

nor was it necessary to show that the business, as conducted, amounted to a nuisance before it was subject to the provisions of this ordinance regulating it. The power to regulate is expressly given by the statute and reasonably includes, as already said, the right to limit and confine the operation of such business to certain territory and to prohibit the carrying of it on in certain other territory, which the city council, by the authority of the State, was left the power to select in the exercise of a reasonable discretion. The power having been vested in the city and duly exercised by its council in the passage of the ordinance, the question is settled thereby for the necessity of the regulation. It is not unreasonable or an undue restraint upon a lawful trade or business, nor an improper restraint upon the lawful and beneficial use of private property." (Printed Record, 21, 22.)

The decision of the Supreme Court of the State of Arkansas, we submit would be final on this point.

In Slaughter House Cases, 16 Wallace 36, at page 66, the court said:

"It may, therefore, be considered as established, that the authority of the Legislature of Louisiana to pass the present statute is ample, unless some restraint in the exercise of that power be found in the Constitution of that State or in the amendments to the Constitution of the United States, adopted since the date of the decisions we have already cited."

In Crowley v. Christensen, 137 U. S. 86, at page 92, the court said:

"The Constitution of California vests in the municipality of the city of San Francisco, the right to make 'all such local police, sanitary and other regulations as are not in conflict with general laws.' The Supreme Court of the State has decided that the ordinance in question, under which the petition was ar-

rested and held in custody, was thus authorized and is valid. The decision is binding upon us unless some inhibition of the Constitution or of a law of the United States is violated by it."

Fischer v. St. Louis, 194 U. S. 361.

III.

There can be no question of the character of the district in which these stables are located; the answer sets up that they are located in the heart of the most valuable property in the State of Arkansas; that the district includes the greatest shopping and hotel district in the State.

Kirby's Digest for the State of Arkansas provides as follows:

"Sec. 5437. All municipal corporations shall have general powers and privileges, and be subjected to rules and restrictions by this act prescribed."

"Sec. 5454. The city government shall have the power to regulate all carts, wagons, drays, hackney coaches, omnibuses and ferries and every description of carriages which may be kept for hire and all livery stables."

"Sec. 5438. The city government shall have the power to prevent injury or annoyance within the limits of a corporation from anything dangerous or unhealthy."

"Sec. 5461. The city council shall have the power to make and publish such by-laws and ordinances, not inconsistent with the laws of the State, as shall seem necessary to provide for the safety, preserve the health, promote the pros-

perity and improve the morals, order and comfort of such city and the inhabitants thereof."

The only question then is whether or not this ordinance is a regulation that is a reasonable one. The city council of the city of Little Rock thought so and the Supreme Court declares that the ordinance was a valid exercise of the police power, and declared the ordinance in question to be a regulation of livery stables, in the following language:

> "The ordinance in question does not attempt to prohibit the carrying on of the business, but only to restrict and limit it to a certain defined territory, or rather to prohibit the operation of it within the small prescribed area or district included in the ordinance. It does not amount to a prohibition of the business, nor was it necessary to show that the business, as conducted amounted to a nuisance before it was subject to the provisions of this ordinance regulating it. The power to regulate is expressly given by the statute and reasonably includes, as already said, the right to limit and confine the operation of such business to certain territory and to prohibit the carrying of it on in certain other territory, which the city council, by the authority of the State, was left the power to select in the exercise of a reasonable discretion. The power having been vested in the city and duly exercised by its council in the passage of the ordinance, the question is settled thereby for the necessity of the regulation. It is not unreasonable or an undue restraint upon a lawful trade or business nor an improper restraint upon the lawful and beneficial use of private property." (Printed Record, 20-21.)

The decision of the Supreme Court of Arkansas is binding upon this court, unless the ordinance violates some provision of the Constitution of the United States. It is claimed by plaintiffs in error that this ordinance violates the Four-

teenth Amendment. Unless this ordinance is so utterly inconsistent, unreasonable and extravagant in its nature and purpose that the property and personal rights of a person or citizen are unnecessarily and in a manner wholly arbitrary, interfered with are destroyed without due process of law, they do not extend beyond the power of the State, and forms no subject for Federal interference. 177 U. S. 183-188, Gundling v. Chicago. Can this court say the ordinance in question is one of this character, when the record shows that the stables are located in a densely populated district, and that their existence is deleterious to the health and obnoxious to the senses of the inhabitants of the locality, reducing the value of the adjoining property and increasing the fire hazard.

An ordinance exactly like this was upheld in case of St. Louis v. Russell, 22 S. W. 470, the court holding that the city had the power to confine livery stables to certain localities within the limits of the city. This rule was also established in the case of Russell v. Beattie, 16 Mo. App. 137; *Ex parte* Lacey, 49 Am. St. R. 93, and at page 94 the court said:

> "Conceding the business covered by the provisions of this ordinance not to constitute a nuisance *per se*, and to stand upon different grounds from powder factories, street obstructions and the like, still the case is made no better for petitioner. This is not a question of nuisance *per se*, and the power to regulate is in no way dependent upon such conditions. Indeed, as to nuisances *per se*, the general laws of the State are ample to deal with them. But the business here involved may be properly classed with livery stables, laundries, soap and glue factories, etc., a class of business undertakings in the conduct of which police and sanitary regulations are

made to a greater or less degree by every city in the country. And in this class of cases it is no defense to the validity of regulation ordinances to say: I am committing no nuisance, and I insist upon being heard before a court or jury upon that question of fact."

In Barbier v. Connolly, 113 U. S. 27, an ordinance of a similar character was involved and the following language was used at page 30:

> "That fourth section, so far as it is involved in the case before the judge, was simply a prohibition to carry on the washing and ironing of clothes in public laundries and wash-houses, within certain prescribed limits of the city and county, from 10:00 o'clock at night until 6:00 o'clock in the morning of the following day. The prohibition against labor on Sunday is not involved. The provision is purely a public regulation within the competency of any municipality possessed of the ordinary powers belonging to such bodies. And it would be an extraordinary usurpation of the authority of a municipality, if a Federal tribunal should undertake to supervise such regulations."

The preamble of the ordinance in question is as follows:

> "Whereas, the conducting of a livery stable business within certain parts of the city of Little Rock, Arkansas, is detrimental to the health, interest and prosperity of the city of Little Rock. Therefore, 'Be it ordained by the city council of the city of Little Rock.'" (Printed Record, 17.)

This shows that the city council had taken the matter up and considered the advisability and necessity of such an ordinance, and after due deliberation it considered there was, and this is conclusive, unless the ordinance contravenes some clause of the Constitution, and we submit that this is not the case.

A city certainty has the right, under police power, to prohibit the carrying on of livery stables in certain described limit on account of the health, morals and prosperity of the citizens, even though an individual may suffer by the operation of that law.

Slaughter House Cases, 16 Wallace 36.

Barbier v. Connolly, 113 U. S. 27.

Soon Hing v. Crowley, 113 U. S. 703-708.

Crowley v. Christensen, 137 U. S. 86.

Mugler v. Kansas, 123 U. S. 623, 665, 668.

Beer v. Mass., 97 U. S. 32.

Lawton v. Steele, 152 U. S. 133-136.

Gundling v. Chicago, 177 U. S. 183-188.

Fischer v. St. Louis, 194 U. S. 361-369.

C., B. & Q. Ry. v. Ill. Drainage Co., 200 U. S. 561, 584, 585, 592, and the cases therein cited.

IV.

The fact that a livery stable is not a nuisance *per se*, does not prevent a regulation on the part of the city council, as was said in the case of Canfield v. U. S., 167 U. S. 518, which is as follows:

> "And it can not be said judicially that volatile, inflammable, explosive and bad-smelling gas is not within the category of things which interfere with the public safety, welfare and comfort, and therefore be-

yond the reach of the police power. The exercise of this power is not confined to the regulation of only such interference with the public welfare and comfort as come strictly within the common law definition of a 'nuisance.'"

In Lawton v. Steele, 152 U. S. 136, the court said:

"Beyond this, however, the State may interfere wherever the public interests demand it, and in this particular a large discretion is necessarily vested in the Legislature to determine, not only what the interests of the public require, but what measures are necessary for the protection of such interests." (Appellants' brief, 3-7.)

Barbier v. Connolly, 113 U. S. 27.

Kidd v. Pearson, 128 U. S. 1.

Fischer v. St. Louis, 194 U. S. 361.

Austin v. Tenn., 179 U. S. 343.

Powell v. Pa., 127 U. S. 678.

Murphy v. Cal., 225 U. S. 623.

V.

Learned counsel for plaintiffs in error insist that the city of Little Rock is estopped from passing the ordinance in question. We submit the city is not estopped from passing any police regulation. The statutes of Arkansas above referred to give the city council power to regulate livery stables; these statutes were in full force and effect at the time plaintiffs in error began business up to the time the ordinance in question was passed.

This question is discussed fully in the case of Mugler v. Kansas, 123 U. S., pages 664-670.

Therefore, we respectfully submit that the decision of the Supreme Court of the State of Arkansas should be affirmed.

J. Merrick Moore,

J. W. & J. W. House, Jr.,

Attorneys for Defendants in Error.